

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1564, 65, 66

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

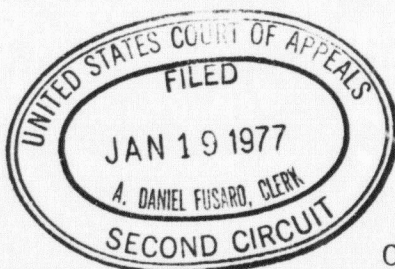
-against-

ROBERT JACKSON, WILLIAM SCOTT,
and MARTIN ALLEN,

Defendants-Appellants.

Docket No. 76-1564
Docket No. 76-1565
Docket No. 76-1566

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JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT JACKSON
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

HENRY BOITEL, ESQ.,
Attorney for Appellant
WILLIAM SCOTT
233 Broadway
New York, New York 10007
(212) 732-2814

TREVOR L.F. HEADLEY, ESQ.,
Attorney for Appellant
MARTIN ALLEN
66 Court Street
Brooklyn, New York 11201
(212) 596-6814

PAGINATION AS IN ORIGINAL COPY

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76 CR 436-1

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U.S. DIST. CT. 76 M 127

E.A. JUDGE

A A

☐ Arrested
☐ Fugitive
☐ Detained
☐ Sent
☐ Pers. Record
☐ JPSA
☐ Conditions

\$100,000

☐ Date
☐ 10% Deposit
☒ Surety Bond
☐ Bail Not Made
☐ Collateral
☐ Status Changed (See Docket)
☐ 3rd
☐ Fry Cust
☐ Other

SENTENCE

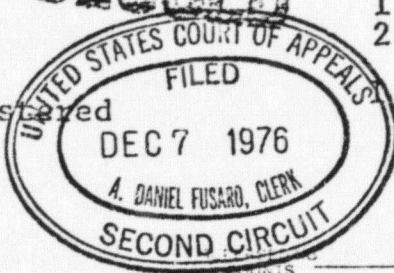
Disposition of Charge
 9/22/76
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On Government's Motion

On All Charges
☐ On Lesser Offense(s)
☐ WOP
☐ WP

U.S. TITLE SECTION

OFFENSES CHARGED

18: 371 Conspiracy
 18:2113(a)(2) Bank Robbery
 26:5871 & 5861(d)
 18: Sec. 2 Possession of unregistered firearms



II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information	Trial Set For
Summons Served	Indict. Waived	1st Plea	Verdict
First Appearance	In Charging District	Final Plea	Trial Begun
6-21-76	Superseding Indict/Info		8/30/76
			8/30/76

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL NO.	OUTCOME
Search Warrant	Issued			PRELIMINARY EXAMINATION		<input checked="" type="checkbox"/> HELD FOR GO OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued			OR		
Arrest Warrant Issued	Served			REMOVAL HEARING		<input type="checkbox"/> HELD FOR GO OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT	6-21-76	VAC/070A		WAIVED		
OFFENSE (In Complaint)	Bank Robbery. T-18 USC Section 2113(a)					

U.S. Attorney or Asst.

Richard Appleby

ATTORNEYS

Defens ☒ CJA ☐ Ret ☐ Waived ☐ Suit ☐ None / Other ☒ CD

LAS

6-24-76 relieved

George Popielarski, Esq.

1565 Franklin Ave., Mineola, NY (516) 248-8880.

* Show last names and suffix numbers of other defendants on same indictment/information.

SCOTT 1 2; ALLEN 3

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCusable DELAY
			(a) (b) (c) (d)
7/7/76		Deft. indicted - See 76 CR 436, Before Dooling, J.	
7-19-76		Notice of readiness for trial filed.	
7-19-76		Before MISHLER, CH J - case called - deft & counsel George Popielarski present - deft arraigned and enters a plea of not guilty - Aug. 23, 1976 for trial - bail set at \$50,000 with cash deposit of \$5,000 / Terms and conditions as indicated on the record - July 23, 1976 for hearing on motion to suppress.	
7/23/76		Before MISHLER, CH. J. - Case called. Defts & Counsel present. Hearing held on motion to suppress. Decision reserved. Hearing concluded.	
7-27-76		Stenographers transcript filed dated 7-23-76	
8/4/76		Government's proposed findings of fact filed.	
8-9-76		By MISHLER, CH J - Memorandum of decision and order filed denying motion for suppressing evidence.	
8-10-76		Voucher for expert services filed. present	
8-23-76		Before Mishler, Ch J - case called - deft/& counsel George Popielarski is reported ill not present - Legal Aid	

IV. PROCEEDINGS (Continued)		PAGE TWO		V. EXCLUDABLE DELAY			
				Excludable Delay (b)	Code (c)	Total Days (d)	
	substituted for Mr. Popielarski as counsel for the deft - case adjd to 8-30-76						A
8-30-76	Waiver of Trial by Jury pursuant to Rule 23 filed.						
8-30-76	Before Mishler, Ch J - case called - defts & attys present - all defts waive trial by Jury - Govt rests - defts motions to dismiss and for Judgment of Acquittal argued and denied; all defts rest - all motions previously made are renewed - decision reserved - trial concluded.						B
9/1/76	Letter to Counsel for deft from Judge Mishler; re: ballistics report in accordance with stipulation; filed.						C
9/1/76	Stenographers transcript dated 8/30/76 filed and returned to Chambers as requested.						D
9-7-76	Stenographers transcript filed dated 8-30-76 filed						E
9-22-76	By MISHLER, CH. J. - Memorandum of Decision finding deft guilty as charged in counts one through four filed.						F
9/22/76	Before MISHLER, CH. J. - Case called. Deft & Counsel present. The Court found the deft guilty on all 4 counts. All motions reserved until time of sentence. Sentence adjd without date.						G
11-9-76	Voucher for compensation of counsel George Popielarski filed						H
11/23/76	Before MISHLER, CH. J. - Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment on count 1 for a period of 2 years and imposition of sentence on counts 2,3, and 4 is suspended and the deft is placed on probation for a period of 3 years. Said probationary term to commence at end of prison term. Clerk to file notice of appeal without fee.						I
11/23/76	Notice of appeal filed.						M
11/23/76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.						N
11-29-76	Judgment & commitment ret'd and filed - deft del. to MCC, NY						O
x 12-6-76	Scheduling Order filed received from the court of appeals that the record on appeal be docketed on or before 12-7-76						P
12-6-76	Stenographer's Transcript dated July 23, 1976 filed.						P

B

U.S. TITLE SECTION OFFENSES CHARGED
18: 371 Conspiracy 1
18:2113(a)(2) Bank Robbery 2
26:5871 & 5861(d)
18: Sec. 2 Possession of unregistered firearms 1

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or
U.S. Custody Began
Summons Served
First Appearance
6-21-76

INDICTMENT X
High Risk Date
Information 7/7/76
Indict Waived
Superseding
Indict/Info

ARRAIGNMENT
7-19-76
1st Plea II
Final Plea

TRIAL
Trial Set For 8-23-76
Verdict
8/30/76
8/30/76

U.S. DISTRICT COURT
CASE NO. 76 M 1270
RELEASE
Date
\$100,000
Date
Status Charged (See Docket)
Disposition of Charge
9/22/76
X Convicted
X All Charges
On Lesser Offenses
Dismissed
On Government's Motion

MAGISTRATE

Search Warrant Issued
Summons Issued
Arrest Warrant Issued
COMPLAINT
OFFENSE (In Complaint)

DATE
6-21-76
VAC/070B
Bank Robbery. T-18 USC Section 2113(a)

INITIAL/NO.
INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION CR
REMOVAL HEARING
WAIVED NOT WAIVED
INTERVENING INDICTMENT

DATE
7-6-76
Date Held

INITIAL NO.
OUTCOME:
DISMISSED
X HELD FOR GUOR OTHER PROCEEDING IN THE DISTRICT
HELD FOR GUOR OTHER PROCEEDING IN THE DISTRICT BELOW

U.S. Attorney or Asst.
Richard Appleby

ATTORNEYS
Robert Riordan, Esq.
32 Court Street
Brooklyn, New York
UL 298873

Show last names and suffix numbers of other defendants on same indictment information.

DATE	DOCUMENT NO.	PROCEEDINGS
7/7/76		Deft. indicted - See 76 CR 436 , Before Pooling J.
7-19-76		Before MISHLER, CH J - case called - deft & atty Robert Riordan present - deft arraigned and enters a plea of not guilty - Aug. 23, 1976 for trial - Bail set at \$50,000 with cashe deposit of \$5,000- Terms and conditions are indicated on the record. July 23, 1976 for hearing on motion to suppress.
7/23/76		Before MISHLER, CH. J. - Case called. Defts & Counsel present. Hearing held on motion to suppress. Decision reserved. Hearing concluded.
7-27-76		Stenographers transcript filed dated July 23, 1976.
8/4/76		Government's proposed findings of fact filed.
8-9-76		By MISHLER, CH J - Memorandum of decision and order filed denying motion to suppress.
8-10-76		Voucher for expert services filed
8-23-76		Before Mishler, Ch J - case called - deft & atty present - adjd to 8-30-76
8-30-76		Waiver of Trial by Jury filed

IV. PROCEEDINGS (continued)

PAGE TWO

V. EXCLUDABLE DELAY

8-30-76

Before Mishler, Ch J - case called - defts & attys present - all defts waive trial by Jury - Govt rests - defts motions to dismiss and for Judgment of Acquittal argued and denied - all defts rest - all motions previously made are renewed - decision reserved - trial concluded.

9/1/76

Letter filed from Judge Mishler to counsel for deft. re: ballistics report in accordance with stipulation.

9/1/76

~~Stenographers transcript dated 8/30/76 filed and returned to Chambers as requested.~~

9-7-76

Stenographers transcript dated 8-30-76 filed

9-22-76

By MISHLER, CH. J. - Memorandum of Decision finding deft guilty as charged in counts one through four filed.

9/23/76

Before MISHLER, CH. J. - Case called. Deft & Counsel present. The Court found the deft guilty on all 4 counts. All motions reserved until time of sentence. Sentence adjd without date. Bail waived to \$25,000 surety. Co. bond on motion of Govt.

11/9/76

voucher for compensation for expert services filed.

11/23/76

Before MISHLER, CH. J. - Case called. Deft & Counsel present. Deft sentenced to imprisonment on count 1 for 5 years, count 2 - 7 years, count 3 - 7 years, and count 4 - 7 years. Clerk to file notice of appeal without fee. The Court recommends confinement at U.S. Penitentiary Atlanta Georgia. Said prison term to run concurrently.

11/23/76

Notice of Appeal filed.

11/23/76

Docket entries and duplicate of Notice of Appeal mailed to the C of A.

11-29-76

Judgment and commitment ret'd and filed - deft was committed to MCC on 6-21-76 and was never released.

12-6-76

Scheduling order filed received from the court of appeals that the record on appeal be docketed on or before 12-7-76

12-6-76

Stenographer's Transcript dated July 23, 1976 filed.

[Handwritten signature]

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MARTIN ALLEN
LAST FIRST MIDDLE

MISHLER, CH J

7 7 76 436 3

U.S. MAG. CASE NO 76 M 1270

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26:5871 & 5861(d)

18: Sec. 2 Possession of unregistered firearms 1

II. KEY DATES & INTERVALS

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U.S. Custody Began	High Risk Date	Information	7-19-76	8-23-76
Summons Served	Indict. Waived	1st Plea	8-30-76	11/23/76
First Appearance	In Charging District	Final Plea	8-30-76	11/23/76
6-21-76	Superseding Indict/Info	Final Plea	8-30-76	11/23/76

DATE	INITIAL/NO.	MACISTRATE	OUTCOME
6-21-76	VAC/070A	Bank Robbery. T-18 USC Section 2113(a)	DISMISSED

U.S. Attorney or Asst.

ATTORNEYS

Defense X A Ret Waived Self None / Other PD CD

Richard Appleby

~~Richard Rosenkranz, Esq.~~ Trevor L.F. Headly

66 Court Street

Brooklyn, New York 11201

875-9440

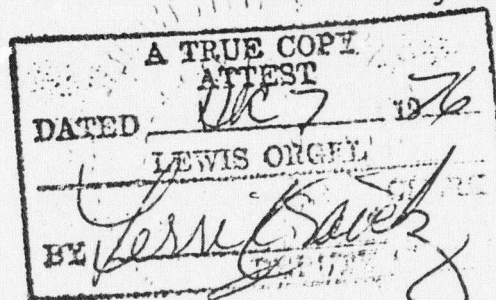
596-6814

* Show last names and suffix numbers of other defendants on same indictment information

Jackson 1; SCOTT 2

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
7/7/76		Deft. indicted - See 76 CR 436, Before Dooling J.	
7-19-76		Before MISHLER, CH J - case called - deft & atty Richard Rosenkranz present - deft arraigned and enters a plea of not guilty - Aug. 23, 1976 for trial. Bail set at \$100,000 surety company as to deft Allen - July 23, 1976 for suppression motion	
7/23/76		Notice of Appearance filed.	
7/23/76		Before MISHLER, CH. J. - Case called. Defts & Counsel present. Hearing held on motion to suppress. Decision reserved. Hearing concluded.	
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8/4/76		Governments proposed findings of fact filed.	
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8-10-76		Voucher for expert services filed	
8-23-76		Before Mishler, Ch J - case called - deft & atty present - case adjd to 8-30-76	

- 8-30-76 Waiver of Trial by Jury filed
 8-30-76 Before Mishler, Ch J - case called - deft & atty present - all defts waive trial by Jury - Govt rests - defts motions to dismiss and for Judgment of acquittal argued and denied - all defts rest - all motions previously made are renewed; decision reserved - trial concluded.
- 9/1/76 Letter filed from Judge Mishler to counsel for deft. Re: ballistics report in accordance with stipulation.
- ~~9/1/76 Stenographers transcript dated 8/30/76 filed and returned to Chambers as requested.~~
- 9-7-76 Stenographers transcript dated 8-30-76 filed
- 9-9-76 Voucher for compensation of attorney filed (Richard Rosenkranz, Esq. apptd by Catoggio on 6-21-76)
- 9-22-76 By MISHLER, CH. J. - Memorandum of Decision finding deft guilty as charged in counts one through four filed.
- 9/22/76 Before MISHLER, CH. J. - Case called. Deft & Counsel present. The court found the deft guilty on all 4 counts. All Motions reserved until time of sentence. Sentence adjd without date.
- 11/23/76 Before MISHLER, CH. J. - Case called. Deft & Counsel present. Deft sentenced to a term of imprisonment on count 1 for a period of 5 years, on count 2 - 10 years, on count 3 - 10 years and on count 4 - 10 years. Said sentence to run concurrently. Clerk to file notice of appeal without fee.
- 11/23/76 Judgment & Commitment filed. Certified copies to Marshals and probation.
- 11/23/76 Financial affidavit filed.
- 11/23/76 Notice of appeal filed.
- 11/23/76 Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
- 11-29-76 Judgment & commitment retd and filed - deft. del to MCC, NY
- 12-6-76 Scheduling order filed received from the court of appeals that the record be docketed on or before 12-7-76
- 12-6-76 Stenographer's Transcript dated July 23, 1976 filed.



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F.#761,874

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JUL 7 - 1976 ★

TIME A.M. _____
P.M. _____

76CR 436
INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

ROBERT JACKSON,
WILLIAM SCOTT and
MARTIN ALLEN,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

From on or about and between the 11th day of June, 1976 and the 21st day of June 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN and Vanessa Hodges and Pia Longhorne, named herein as co-conspirators but not as defendants, did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 18, United States Code, Section 2113(a), by conspiring to take from the person and presence of employees of the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York, by force, violence, intimidation and the use of dangerous weapons, a quantity of United States currency, which currency was in the care and custody of the Manufacturers Hanover Trust, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States, Code, Section 371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN and co-conspirator Vanessa Hodges committed, among others, the following:

(1)

O V E R T A C T S

1. On or about the 14th day of June 1976, the defendants ROBERT JACKSON, WILLIAM SCOTT AND MARTIN ALLEN and co-conspirator Vanessa Hodges drove a vehicle to the vicinity of the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York.

2. On or about the 14th day of June 1976, the defendant ROBERT JACKSON entered the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York.

3. On or about the 14th day of June 1976, the defendant MARTIN ALLEN entered the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York.

4. On or about the 14th day of June 1976, the defendant WILLIAM SCOTT entered the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York.

5. On or about the 14th day of June, 1976 the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN and co-conspirator Vanessa Hodges did possess two single-barrelled, pump action, 12 gauge sawed-off shotguns.

6. On or about the 21st day of June 1976 the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN drove a vehicle to the vicinity of the Manufactures Hanover Trust, 210 Flushing Avenue, Brooklyn, New York.

7. On or about the 21st day of June 1976, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN drove a vehicle to the vicinity of the Manufactures Hanover Trust, 210 Flushing Avenue, Brooklyn, New York, whereupon the defendant WILLIAM SCOTT exited said vehicle and stood at the corner of Myrtle Avenue and Washington Street, Brooklyn, New York.

8. On or about the 21st day of June 1976, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN did

possess two single-barrelled, pump action, 12 gauge sawed-off shotguns.

COUNT TWO

On or about the 14th day of June 1976, within the Eastern District of New York, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN, and Vanessa Hodges, named herein as a co-conspirator but not as a defendant, did attempt to knowingly, wilfully and feloniously, by force, violence and intimidation take from the person and presence of employees of the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York, United States currency, which money was in the care, custody, control, management and possession of the said Manufacturers Hanover Trust, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

COUNT THREE

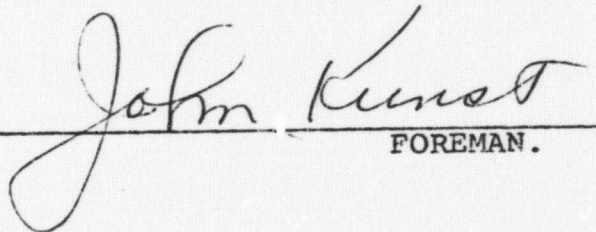
On or about the 21st day of June 1976, within the Eastern District of New York, the defendants, ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN did attempt to knowingly, wilfully and feloniously, by force, violence and intimidation take from the person and presence of employees of the Manufacturers Hanover Trust, 210 Flushing Avenue, Brooklyn, New York, United States currency, which money was in the care, custody, control, management and possession of the said Manufacturers Hanover Trust, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

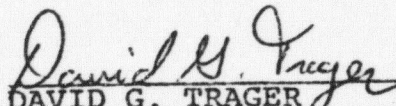
COUNT FOUR

On or about the 21st day of June 1976, within the Eastern District of New York, the defendants ROBERT JACKSON, WILLIAM SCOTT and MARTIN ALLEN knowingly and unlawfully did

possess "firearms", as defined by Title 26, United States Code, Section 5845(a), to wit, two single-barrelled, "pump action, 12 gauge sawed-off shotguns having barrels of less than 18 inches in length, said sawed-off shotguns not having been registered to the defendants in the National Firearms Registration and Transfer Record. (Title 26, United States Code, Sections 5861(d) and 5871 and Title 18, United States Code, Section 2).

A TRUE BILL.


FOREMAN.


DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

NOT FILMED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

AUG 9 1976

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

No. 76-CR-436

- against -

Memorandum of Decision
and Order

ROBERT JACKSON, et al,

Defendants.

-----x

August 9, 1976

MISHLER, CH. J.

Defendants moved to suppress as evidence two sawed-off shotguns, masks, a toy pistol and handcuffs seized on June 21, 1976, by F.B.I. agents from a Lincoln sedan in which defendants were occupants.

The court held an evidentiary hearing. The court finds:

On or about June 17, 1976, an informant (with whom the F.B.I. had no prior contact) told agents of the F.B.I. that several black males planned to rob the branch of the Manufacturers Hanover Trust Company located at 210 Flushing Avenue (southeast corner of Washington Avenue and Flushing Avenue) in the Borough of Brooklyn on June 21, 1976. One of the potential robbers was described as having an eye defect. The informant advised that the robbers expected to use a

69

brown motor vehicle and affix a cardboard license plate in the robbery; that they would be heavily armed with hand and shoulder weapons.

At about 7:00 A.M. on June 21, 1976, ten agents took various surveilling positions in the area of the bank. At about 7:00 A.M. the agents saw a four door brown Lincoln sedan with three black males proceed past the bank in an easterly direction. The rear license plate was not the original license plate but a cardboard substitute. In a short time it returned to the southeast corner of Washington Avenue and Flushing Avenue parking at a fire hydrant on Washington Avenue near Flushing Avenue. One of the occupants who was observed to have an eye deformity exited the vehicle and walked to the corner. He then walked south in the direction of the parked vehicle and returned with a container of coffee in hand. He walked to the front of the bank and looked around. He returned to the parked vehicle. The vehicle then turned left, in a westerly direction on Flushing Avenue; it turned around on Flushing Avenue and came to a stop on the south side of Flushing Avenue, west of the bank (between Washington and Waverly Avenues). It remained in a parked position for about five minutes with the occupants in the vehicle. The vehicle

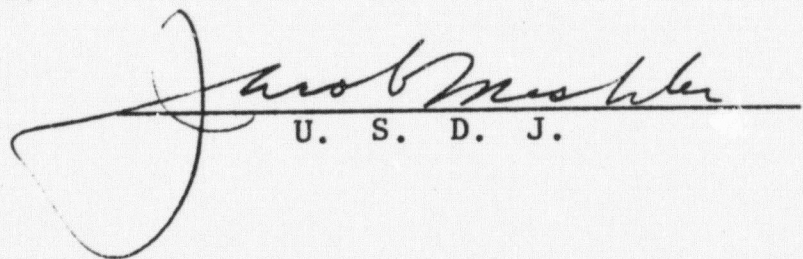
proceeded easterly past the bank again for two blocks to Grand Avenue. It made a right turn south on Grand Avenue and came to a stop. The hood of the vehicle was in an upright position and one of the black males was examining the motor. The vehicle returned to its previous position on Flushing Avenue between Washington and Waverly Avenues. The front license plate had been removed. It remained in that position for approximately thirty minutes. The vehicle with the three black male occupants proceeded easterly along Flushing Avenue. The agents had reason to believe that one of the occupants suspected that they were being surveilled. The Lincoln turned south on Grand Avenue at an accelerated speed. It was overtaken by surveilling agents and the occupants were ordered out of the vehicle. The agents observed a black and red canvas suitcase on the back floor board. The zipper was open revealing the weapons, masks and handcuffs which are the subject of this motion.

The validity of the seizure turns on the validity of the arrest which in turn must be based on probable cause to believe that a crime was being committed. The information supplied by the informant was insufficient. The test is whether the arresting officers had probable cause at the time of arrest. U.S. v. Martin, 509 F.2d 1211 (9 Cir.),

((

cert. denied, 421 U.S. 967, 95 S.Ct. 1958 (1975); U.S. v. Tramontana, 460 F.2d 464, 467 (2 Cir. 1972). The arrest was made when the agents ordered the occupants to leave the vehicle. U.S. v. Troutman, 458 F.2d 217, 220 (10 Cir. 1972). The observations of the agents which confirmed the information supplied by the informant supplied proof of the informant's reliability and the reliability of the information. Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329 (1959); U.S. v. Archuleta, 446 F.2d 518, 519-520 (9 Cir. 1971); U.S. v. Comissiong, 429 F.2d 834, 836 (2 Cir. 1970).

The motion is in all respects denied, and it is
SO ORDERED.


U. S. D. J.

FILED
IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y.

★ SEP 22 1976 ★

TIME A.M...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 436

UNITED STATES OF AMERICA

RECEIVED

-against-

Memorandum of Decision

ROBERT JACKSON,
WILLIAM SCOTT, and
MARTIN ALLEN,

Defendants.

September 22, 1976

MISHLER, CH. J.

Defendants are charged as follows:

COUNT ONE Conspiracy between June 11, 1976 and June 21, 1976, to commit armed bank robbery of the Manufacturers Hanover Trust Company, 210 Flushing Avenue, Brooklyn, New York (18 U.S.C. §371);

COUNT TWO Attempted armed bank robbery on June 14, 1976 (18 U.S.C. §2113(a));

COUNT THREE Attempted armed bank robbery on June 21, 1976 (18 U.S.C. §2113(a));

COUNT FOUR Possession of unregistered sawed-off shotguns
(26 U.S.C. §5861(d)).

Trial was to the court without a jury. The court finds:

On June 11, 1976, Vanessa Hodges, an undicted co-conspirator met Martin Allen through Rea Longhorne, the other undicted co-conspirator named in Count One. She invited him to join her in a plan for the robbery of a branch of the Manufacturers Hanover Trust Company, located at 210 Flushing Avenue, in Brooklyn. Hodges proposed that the bank be robbed the next Monday, June 14th, at about 7:30 A.M. with the week-end deposits as the target. The scheme contemplated entering the bank at that hour as the manager opened the door of the bank. Allen accepted the invitation, and offered a sawed-off shotgun and .38 caliber pistol for use in the robbery. The next Monday morning at about 7:30 A. M., Allen met with Hodges. They entered a car driven by defendant Robert Jackson. A suitcase in the back seat contained a sawed-off shotgun, shells, material intended as masks, and handcuffs. They arrived at the bank after 8:00 A. M. It was too late to put into operation the first important step

in the plan, i.e., entering the bank as the manager opened the door. They retired to a nearby restaurant for food and a pause to reflect on the attendant problems. The group returned to the bank at about 9:00 A.M. Hodges and Allen exited the car. They observed the bulky night deposits and decided it was too risky to attempt the robbery without another hand. Defendants and Hodges went to the Coney Island section of Brooklyn to seek out defendant William Scott. They found him and he joined the group after being told of the plan. Allen obtained another sawed-off shotgun. Defendants and Hodges returned to the bank. Scott entered the bank on the pretext of filling out an application for a credit card. He noticed the tellers were separating the night deposits and that a number of patrons were now in the bank. Scott noted that the bank had a single surveillance camera over the entrance door. In the meantime, Jackson had placed a piece of cardboard with a false license number over the license plate of the car. When Scott reported his observations to his confederates, they decided to abandon the plans for the robbery that day, and rescheduled it for Monday, June 21st, at 7:30 A.M. It was then about 1:30 P.M. The group returned to Coney Island. In preparation for the

robbery, they purchased a pair of stockings for Hodges to wear over her head as a disguise and gloves for Hodges, Scott and Allen.

Hodges was arrested on Friday, June 18th, on an unrelated bank robbery charge. She told the arresting agents of the bank robbery planned for the next Monday. F.B.I. agents surveilled the bank on June 21st beginning at 7:00 A.M.

Defendants arrived in the area of the bank at about 7:00 A.M. on June 21st, in the brown Lincoln sedan. It drove past the bank in an easterly direction, circled the block, and then parked at a fire hydrant on Washington Avenue, south of Flushing Avenue. (The bank is located on the southeast corner of Washington Avenue and Flushing Avenue.) Scott exited the vehicle and walked to the corner. He looked into the bank. He then returned to the vehicle. The vehicle then turned left on Flushing Avenue and proceeded in a westerly direction; it made a U-turn and stopped on the southerly side of Flushing Avenue, between Washington Avenue and Waverly Avenue (west of the bank). Thereafter, it proceeded in an easterly direction, past the bank again for two blocks, and turned south on Grand Avenue, where it

came to a stop. Jackson got out of the car. The vehicle returned to its previous position on Flushing Avenue, between Washington Avenue and Waverly Avenue, for about thirty minutes. Defendants, suspecting that they were under surveillance, decided to abandon their plans and leave the area. The vehicle proceeded at an accelerated rate of speed easterly on Flushing Avenue, then southerly on Grand Avenue where they were overtaken by arresting officers. The officers seized a suitcase containing the sawed-off shotguns. One shotgun had an overall length of 24 inches with a barrel length of 14 inches; the other had an overall length of 27 inches and a barrel length of 15 inches. Each gun was loaded with three rounds. Six additional rounds were seized.

I find the defendants, Robert Jackson, William Scott and Martin Allen, guilty as to Counts One and Four. The evidence against defendants on these counts was overwhelming. As to Counts Two and Three, I also find the defendants guilty. Counts Two and Three, however, involve the elusive question of what constitutes an attempt under federal law. Here, the issue of whether defendants had attempted a robbery or were merely engaged in preparation was a close one.

Analysis must begin with the acknowledgement that "attempt" as used in §2113(a) is not defined. In fact, "there is no comprehensive statutory definition of attempt in federal law." United States v. Heng Awkak Roman, 356 F. Supp. 434, 437 (S.D.N.Y.), aff'd., 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978, 94 S.Ct. 1565 (1974). Definitions of attempt appear to accrue in direct relation to the number of decisions written on the subject. It is necessary to decide on a formulation of what constitutes an attempt that will distinguish the crime from that of conspiracy as well as justify the heavier penalties that may be imposed when such an offense is committed.^{/1}

In United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920, 72 S.Ct. 362 (1952), the defendant was convicted of an attempt to deliver classified government documents to a foreign citizen. Although the defendant was arrested before the documents had been proffered to the foreign national—or indeed even before the defendant had removed them from her purse—the Second Circuit affirmed the conviction, rejecting the doctrine that an attempt could not occur unless the defendant had done all that he could to commit the crime, "but has been prevented

by intervention from outside. Id. at 375. Judge Learned Hand observed that, although this doctrine may once have been followed,

it is certainly not now generally the law in the United States, for there are many decisions which hold that the accused has passed beyond "preparation," although he has been interrupted before he has taken the last of his intended steps.

Quoting from Justice Holmes' opinion in Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901), Judge Hand went on to state:

"Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime." We have found scarcely any decisions of federal courts, but, so far as they go, they are in accord. There can be no doubt in the case at bar that "preparation" had become "attempt." The jury were free to find that the packet was to be delivered that night, as soon as they both thought it safe to do so. To divide "attempt" from "preparation" by the very instant of consummation would be to revert to the old doctrine.

185 F.2d at 633 (footnotes omitted).

Accord, United States v. Noreikis, 481 F.2d 1177, 1182 (7th

Cir. 1973), vacated and remanded on other grounds, 415 U.S. 904, 94 S.Ct. 1398 (1974); United States v. Butler, 204 F. Supp. 339, 343-44 (S.D.N.Y. 1962).

More recently, two circuit courts of appeal adopted a dual-pronged standard to determine what conduct constitutes a criminal attempt. After a lengthy discussion of case law on attempts, the Fifth Circuit, in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, ____ S.Ct. ____ (1975), distilled from "varying verbal formulations" the following definition:

First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting.

. . . .

Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

Id. at 376. Accord, United States v. Green, 511 F.2d 1062 (7th Cir. 1975). See United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974); Mims v. United States, 375 F.2d 135 (5th Cir. 1967). This standard rejects any requirement that the

defendant neared completion of the crime or that his behavior substantially encompassed all the elements of the crime although in the end the attempt was unsuccessful. As the Supreme Court observed in an early opinion, "[t]o attempt to do an act does not imply a completion of the act, or in fact any definite progress towards it. Any effort or endeavor to effect the act will satisfy the terms of the law." United States v. Quincy, 6 Pet. 445, 31 U.S. 445 (1832). Accord, United States v. Robles, 185 F. Supp. 82, 85 (N.D. Cal. 1960); Mathes & Devitt, Federal Jury Practice and Instructions (1965). Thus, the essence of the crime is criminal purpose effected by overt acts that corroborate the seriousness of the defendant's criminal intent. This formulation thereby

shifts the emphasis from what remains to be done—the chief concern of the proximity tests—to what the action has already done. The fact that further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial.

Model Penal Code, §5.01, Comments at 47 (Tentative Draft No. 10, 1960).¹² Furthermore, a conviction for attempt, with its attendant heavy penalties, is justified when the

defendant has manifested "a certain dangerousness," United States v. Butler, supra at 344, without necessarily committing the intended crime, or even a dangerous act, i.e., shooting at a person but missing the mark. It is enough that the gun was purchased and the would-be assailant waited in ambush with the loaded weapon fixed on the victim.¹³

Turning to the question of attempt under §2113(a), I think the Mandujano standard serves the Congressional purpose in enacting this provision. Section 2113(a) provides in relevant part:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank . . . or

Whoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

The statute is obviously designed to deter conduct that involves acts leading to actual bank robbery, although the robbery does not take place. See Prince v. United States,

352 U.S. 322, 328, 77 S.Ct. 403, 407 (1957). Indeed, to convict under this statute for attempted robbery it is not necessary to establish that an actual entry into the bank had been made by the accused. See Rumfelt v. United States, 445 F.2d 134 (7th Cir.), cert. denied, 405 U.S. 853, 92 S. Ct. 92 (1971).

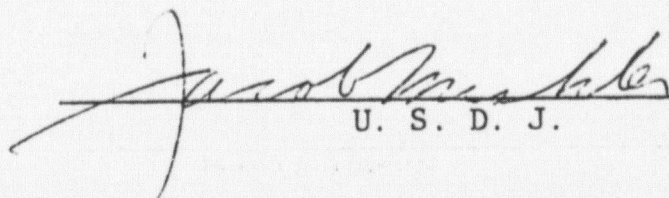
In the final analysis, of course, the question of whether an attempted bank robbery has been committed is one of degree. The answer will vary in each case, depending on the intent of the defendant, the "substantial steps" taken to effect that intent, and the defendant's manifestation of dangerousness.¹⁴

In the present case, the defendants intended to commit an armed bank robbery, first on June 14, and then on June 21. The critical question is whether the defendants took substantial steps, corroborative of their intent, toward the commission of the crime. On June 14, the defendants, already agreed on a robbery plan, drove to the bank. Their car was loaded with armed weapons. In order to carry the night deposit sacks, another individual was recruited. Cardboard was placed over the license, and Scott entered the bank to reconnoiter. By any measure, substantial steps

had been taken to carry out the robbery plan.¹⁵ An armed assault on the bank would have been the next act if fewer bank patrons had been present. These men were seriously dedicated to the commission of a crime; their conduct had passed beyond the stage of preparation to a point where society has an interest in intervening in order to punish and deter.

On June 21, essentially the same acts were done by defendants. Since the bank already had been checked for the location of television cameras, there was no need to enter for surveillance. Indeed, since defendants had arrived at 7:00 A.M., the conditions were more favorable to the robbery plan that day than on the 14th. The next step would have been an assault on the bank as the manager opened the door at 7:30 A. M. Only the presence of the F.B.I. agents thwarted the defendants. Here, as on the 14th, the defendants took substantial steps that affirmed their criminal intentions and manifested sufficient dangerousness to justify a conviction for attempt.

In sum, I find the defendants guilty as charged in Counts One through Four.


U. S. D. J.

FOOTNOTES

^{/1} Under §2113(a), a defendant convicted of attempted bank robbery can be sentenced to a maximum of 20 years. By contrast, a conspiracy conviction under 18 U.S.C. §371 carries a maximum penalty of five years imprisonment.

^{/2} The Mandujano formulation essentially tracks the American Law Institute's Model Penal Code. Section 5.01 of the Code reads in pertinent part:

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(continued on page 14)

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(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose.

Model Penal Code, §5.01 (Proposed Official Draft 1962). The proposed amendments to the Federal Criminal Code would enact the following definition:

§1001. Criminal Attempt

(a) OFFENSE—A person is guilty of an offense if, acting with the state of mind required for the commission of a crime, he intentionally engages in conduct that, in fact, amounts to more than mere preparation for, and that indicates his intent to complete, the commission of the crime.

S. 1, 94th Cong. 1st Sess. §1001 (1975). According to the Senate Report accompanying S.1, this definition is similar to that adopted in United States v. Mandujano, supra:

The offense as drafted here contains two essential elements: a person must (1) intentionally engage in conduct, acting otherwise with the state of mind required for the commission of a crime, and (2) the conduct must amount to more than mere preparation for, and indicate his intent to complete, the commission of the crime.

Report of the Committee on the Judiciary United States Senate to Accompany S. 1, Report No. 94-00, 94th Cong. 1st Sess. 171 & n. 20 (1975).

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See People v. Sullivan, 173 N.Y. 122, 135-36 (1903). In that case, defendants were convicted of murder while attempting to commit a robbery. The defendants, armed

(continued on page 15)

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with chisels, had been proceeding toward a post office they intended to rob when they encountered a police officer. Shots were fired and the officer was killed. On appeal, the defendants argued that they had not committed the crime of attempted robbery, the offense underlying their felony murder conviction. The court rejected this contention, stating that

if the jury believed that the defendant and his associates were at the post office reconnoitering or inspecting it with the intent to break it open, and that they would have done so had their design not been frustrated by the presence or interference of the deceased, the police officer, then I think it could properly find that they were engaged in an attempt to commit burglary.

Id. at 135. See People v. Collins, 234 N.Y. 355 (1922). Compare People v. Rizzo, 246 N.Y. 334 (1927) with People v. Gormley, 222 App. Div. 256, 225 N.Y.S. 653 (1927), aff'd. w'o opinion, 248 N.Y. 583 (1928).

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Two elements distinguish the Mandujano definition of attempt from the crime of conspiracy. First, proof of "substantial steps" is required to convict for attempt, while a single overt act will support a conspiracy conviction. Second, the essence of a conspiracy is the agreement to commit a crime. See United States v. Rabinowich, 238 U.S. 78, 35 S.Ct. 682 (1915). if an overt act is committed in furtherance of the conspiracy, then, regardless of the act's importance to the overall scheme, there is no need to prove that the conspirators made a serious effort to carry out their agreement. An attempt, however, involves a significant manifestation of dangerousness on the part of actors who have taken substantial steps to effect their illegal purpose.

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The Model Penal Code suggests that the following conduct qualifies as "substantial steps":

(continued on page 16)

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Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Model Penal Code §5.01 (Proposed Official Draft 1962).
Accord, Report of the Committee on the Judiciary United States Senate to Accompany S. 1, Report No. 94-00, 94th Cong. 1st Sess. 172 (1975).

CERTIFICATE OF SERVICE

Jun 19, 1977

I certify that copies of this [REDACTED] joint appendix
have been served on the following:

The Honorable David G. Trager
United States Attorney
Eastern District of New York

Henry Boitel, Esq.,
Attorney for Appellant Scott

Trevor L.F. Headley, Esq.,
Attorney for Appellant Martin

Ry SL [Signature]